IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Regular Second Appeal No.104 of 1995.
Judgment Reserved on:24.08.2007.
Date of decision: 21.09.2007.

Suresh Kumar & Others ….**Appellants**

Versus

Subhash Chand & Others ….**Respondents.**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?

For the Appellants: **Mr.Anand Sharma, Advocate.**

For Respondents 2 & 3: **Mr.R.K. Sharma, Advocate.**

Dev Darshan Sud,J.

This is the defendants' appeal against the judgment of the learned District Judge affirming the judgment and decree passed by the learned Sub Judge Ist Class-(1), Hamirpur, granting a decree for declaration and possession of the land measuring 2 Marlas 1 Sarsahi, comprised in Khasra No.425/240/1 as shown in Tatima Ex.LC/1, a decree for demolition of the structure standing thereon and a decree for permanent prohibitory injunction restraining the appellants-defendants from raising any construction on the suit land till partition is effected. The plaintiff-respondent approached the trial Court with a

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***Whether the reporters of Local Papers may be allowed to see the judgement*?**

prayer that he alongwith other co-sharers is owner in possession of land entered in Khata No.36, Khatauni No.82, Khasra No.425/240, measuring 2 Kanals 18 Marlas as recorded in the Jamabandi for the year 1973-74 in Tikka Gaura Khurd, Tappa Bajuri, Tehsil and District Hamirpur.

The suit was resisted by the defendants on the ground of non-joinder of necessary parties i.e. the other co-sharers. It was pleaded that they were in possession of the suit land for a long period of time and have not interfered with the ownership and possession of the plaintiff. After trial, the learned trial Court decreed the suit as prayed for. While passing the decree, reports of two Local Commissioners were considered by the learned trial Court. The learned Court held that the reasons assigned by the Local Commissioners were clear and cogent and the objection raised by the appellants-defendants that the reports namely; Ex.LC/1, Akas Shajra Kistwar and Ex.LC/2 were worthy of credence. An appeal preferred before the learned Appellate Court was dismissed.

This appeal was admitted on the following substantial questions of law:

(2) Whether the learned courts below did not err in considering the fact that the report of the Local Commissioner was against the rules framed by the Hon'ble High Court?

(4) Whether the learned courts below did not misread the evidence on the record and were justified in ignoring the other evidence on the record?

(5) Whether the courts below were justified in holding that the suit could proceed without any other co-sharers as parties?

(6) Whether the learned courts below were justified in not considering the report of the Kanoongo Ex.DW-1/16A and other evidence of Patwari and other evidence on the record?

I have heard learned counsel for the parties and have gone through the record of the case.

The first question requiring determination is:

> "***(2) Whether the learned courts below did not err in considering the fact that the report of the Local Commissioner was against the rules framed by the Hon'ble High Court?***

Before this question is discussed, a preliminary objection has been raised on behalf of the respondents-plaintiffs that no determination can be made on this question as it is a finding of fact having been arrived at by both the learned Courts below. Learned counsel has placed reliance on two judgments of the Hon'ble Supreme Court in ***H.P. Pyarejan*** *vs.* ***Dasappa (Dead) by L.Rs. & Ors. AIR 2006 SC 1144*** and ***Hero Vinoth (minor)*** *vs.* ***Seshammal, AIR***

2006 SC 2234, holding that the High Court is debarred from examining the question of fact having been concluded by the Courts below. This proposition of law is by now well settled. However, for applicability of law, it has to be considered as to whether there is a finding of fact or not? The question raised by the learned counsel is that the demarcation which was carried out is against law and the statutory mandate of Chapter 1-M of the High Court Rules and Orders. He submits that a reading of the judgment and the evidence discloses that no attempt or effort for compliance with the provision as aforesaid has been made. The question as to whether demarcation has been carried out in accordance with law or not is a question of law. In these circumstances, it is submitted, it cannot be said that there are concurrent findings of fact. The basis of the cause having not been established by the plaintiff, it is not open to urge that the matter stands concluded by a decision on facts.

In ***State of H.P. vs. Laxmi Nand and others, (1992) 2 Sim.L.C. 307*** this Court has held:

> ***"15.*** *Since there was no set measurement procedure, to be followed, while defining limits of holdings of private individuals, to decide boundary dispute cases, a reference was made by the High Court of Judicature at Lahore to the Financial Commissioner. Punjab for issuance of necessary instructions and*

guidelines to the Revenue Officer, who were enjoined with the duty to carry out demarcation of the boundaries on the spot, in accordance with the provisions of section 101 of the Punjab Land Revenue Act, 1887 (which corresponds to section 107 of the Himachal Pradesh Act). The Financial Commissioner issued the necessary instructions and guidelines in tis behalf in exercise of the powers under section 100 of the Punjab Land Revenue Act (corresponding to Section 106 of the Himachal Pradesh Act), which now form part of Chapter –M of Volume 1 of High Court Rules and Orders, as stated above. We have been informed that these instructions are still in vogue and have neither been withdrawn nor modified and are still in vogue and have neither been withdrawn nor modified and are required to be followed. IN order to answer the question posed before us, it would be profitable to quote the instructions in extenso, as under:-

> ***"I.*** *If a boundary is in dispute the Field Kanungo should relay it from the village map prepared at the last settlement. If there is a map which has been made on the square system he should reconstruct the square in which the disputed land lies. He should mark on the ground on the lines of the squares*

the places where the map shows that the disputed boundary intersected those lines, and then to find the position of points which do not fall on the lines of the squares, he should with his scale read on the map the position and distance of those points from line of a square and then with a chain and cross staff mark put the position and distance of those points. Thus, he can set out all the points and boundaries which are shown in the map. But if there is not a map on the square system available, he should then find three points on different sides of the place in dispute as near to it as he can, and, if possible, not more than 200 kadams apart which are shown in the map and which the parties admit to have been disturbed. He will chain from one to another of these points and compare the result with the distance given by the scale applied to the map. If the distances when thus compared agree in all cases, he can then draw lines joining these three points in pencil on the map and draw perpendiculars

with the scale from these lines to each of the points which it is required to lay out on the ground. He will then lay them out with the cross staff as before and test the work by seeing whether distance from one of his marks to another is the same in the map. If there is only a small dispute as to the boundary between two fields, the greater part of which is undisturbed, then such perpendiculars as may be required to points on the boundaries of these fields as shown in the field map can be set out from their diagonals, as in the filed book and in the map, and curves made as shown in the map.

II. *In the report to be submitted by him, the Kanungo must explain in detail how he made his measurement. He should submit a copy of the relevant portion of the current settlement field map of the village showing the fields if any with their dimensions (Karu kan) of which he took measurement situated between the points mentioned in Instruction I above and the boundary in dispute. This is necessary to enable the Court*

to follow the method adopted and to check the Field Kanungo's proceedings.

III. *If a question is raised as to the position of the disputed boundary according to the filed map of the settlement proceeding of the currect settlement, that also should be demarcated on the ground so far as this may be possible and also shown in the copy of the current filed map to be submitted under instruction No.II.*

IV. *On the same copy should be shown also the limits of existing possession.*

V. *The areas of the fileds abutting on the boundary in dispute as recorded at the time of last settlement and those arrived at as a result of the measurement on the spot should be mentioned in the Field Kanungo's report with an explanation of the cause of increase or decrease if any discovered.*

VI. *When taking his measurement the field Kanungo should explain to the parties what he is doing and should enquire from them whether they wish anything further to be done to elucidate the matter in dispute. At the*

end he should record the statements of all the parties to the effect that they have seen and understood the measurements, they have no objection to make to this or if they have any objection, he should record it together with his own opinion) and that they do not wish to have anything further done on the spot. It constantly happens that when the report comes before the Court one or other party impugns the correctness of the measurement and asserts that one thing or another was left undone. This raises difficulties which the above procedure is designed to prevent.

VII. *The above instructions should be followed by Revenue Officers or Field Kanungo's whenever they are appointed by a Civil court Commissioners in suits involving disputed boundaries."*

16. *Demarcation of boundaries of any holding, field or any portion of any other estate under section 107 of the Act is otherwise a statutory function of quasi-judicial nature of the Revenue Officer, as held in Radha Swami Satsang Beas through Shri Madan*

> *Gopal Singh vs. State of H.P. and another ILR 1984 HP 317. Since the function to demarcate the limits of any holding or field is a statutory function of a quasi-judicial nature, it is, therefore, absolutely necessary for the Revenue Officer, while carrying out demarcation, to perform the function in accordance with the instructions and guidelines, which have been issued by the Financial Commissioner under the powers contained in section 106 of the Act meticulously without any deviation therefrom, since it also affects valuable rights of the estate right holders. The report of demarcation on the face of it must show that all precautions which are required to be taken as per the instructions were the method adopted by the Revenue Officer while carrying out demarcation and to find out that no mistake has been committed in doing so, so as to avoid the possibility of any error having crept in.*

This decision has been noticed in detail as the law laid down, governs the demarcation of boundaries. In a case for injunction the encroachment can be identified only if proper demarcation is carried out. Learned counsel appearing for the

appellants has drawn my attention to the evidence of OW-1 Shri Roshan Lal, Naib Tehsildar (Bandobast), Hamirpur & Una. In particular he has made reference to the deposition in examination-in-chief stating that the demarcation on the eastern side was not possible. He also drew my attention to the portion of the evidence where the witness had admitted that he had not been in possession of the Mussabi on the basis of which the demarcation could be carried out. The Revenue Officer was using a Latha which can hardly be a satisfactory method of demarcating the boundary or identifying the points fixed for measurement, more especially, when the authenticity of this Latha itself has not been admitted by this witness. Another aspect which needs to be considered is that according to this witness at point `C' towards south, at point `D' towards south and att points `B' and `E', no measurement was possible. How and in what circumstances demarcation was made by reference to various mutations without fixing the points at the spot? The proceedings are unclear and the compliance of Chapter-1-M of the High Court Rules and Orders has not made at all. Another Local Commissioner has filed his report. His report is to be rejected outright as it is based on hearsay and inquiries made from the various persons is without identification of the land.

The primary duty of both the Courts below was to have ascertained the boundaries of the disputed

property to find out encroachment and not to draw inference without going through the records. A fact which could have been ascertained by measurement at the spot, the same having not been done, no decree could have been passed against the appellants. It was the primary duty of the plaintiff to have established the nature and extent of the encroachment by way of demarcation in accordance with law. The plaintiff having failed to discharge this burden/onus the question is answered in favour of the appellants and against the respondents. The question is answered in favour of the appellants and I hold that the learned Courts below were not right in placing reliance on the report of demarcation.

The other three questions would not require any determination for the reasons that I have held that the demarcation report, which is fundamental to the entire controversy between the parties, is against the law laid down by this Court and cannot be relied upon for granting any relief to the plaintiff.

In the facts and circumstances of the case, this appeal is allowed. The judgment and decree of the learned District Judge is set aside and the suit of the plaintiff is dismissed.

September 21, 2007 **(Dev Darshan Sud)**
(aks) **Judge.**